

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Family Stations, Inc.)	
)	
v.)	CSR-5761-M
)	
EchoStar Satellite Corporation)	
)	
Petition for Reconsideration)	

MEMORANDUM OPINION AND ORDER

Adopted: May 1, 2002

Released: May 3, 2002

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. In this Order, we consider a petition for reconsideration of our initial order¹ and alternatively, a petition for waiver of Section 76.66(c)(3) filed with the Commission by Family Stations, Inc. ("Family Stations"), licensee of commercial television station KFTL, Channel 64, Stockton, CA ("KFTL" or the "station"). Our Initial Order denied KFTL's complaint against EchoStar Communications Corporation ("EchoStar") for its refusal to carry the signal of KFTL on its satellite system providing "local-into-local" satellite service in the Sacramento-Stockton-Modesto ("Sacramento") market, the designated market area ("DMA") where station KFTL operates. For the reasons set forth below, we deny KFTL's petition for reconsideration and alternatively, petition for waiver of Section 76.66(c)(3).²

2. Section 338 of the Communications Act of 1934, adopted as part of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"),³ requires satellite carriers, by January 1, 2002, to carry upon request all local television broadcast stations' signals in local markets in which the satellite carrier carries at least one local television broadcast signal pursuant to the statutory copyright license.⁴ A station's market for satellite carriage purposes is its DMA, as defined by Nielsen Media Research.⁵ A

¹ *Family Stations, Inc. v. EchoStar Satellite Corp.*, DA 02-152 (CSB rel. Jan. 18, 2002) ("Initial Order").

² Although KFTL has chosen to seek remedial action for non-carriage with the Commission, the Satellite Home Viewer Improvement Act of 1999 also permits KFTL to file a civil action in United States District Court for EchoStar's refusal to carry its signal. *See* 47 U.S.C. § 338(a)(2).

³ *See* Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

⁴ *See* 47 U.S.C. § 338.

⁵ *See* 17 U.S.C. § 122(j)(2)(A)-(C). *See also Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*, 16 FCC Rcd 1918, 1934 (2000) ("DBS Must Carry Report & Order"); 47 C.F.R. § 76.66(e) ("A local market in the case of both commercial and noncommercial television stations is the designated market area in which a station is located, and (i) in the case of a commercial television broadcast station, all commercial television broadcast stations licensed to a community within (continued....)

DMA is a geographic area that describes each television market exclusive of others, based on measured viewing patterns. In November 2000, the Commission, in *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*, adopted rules to implement the provisions contained in Section 338.⁶ For the initial election cycle, broadcast stations were required to notify satellite carriers by July 1, 2001 of mandatory carriage election for carriage to commence on January 1, 2002.⁷ Section 76.66(d)(1)(ii) requires that must carry elections be made in writing and sent to the satellite carrier's principal place of business, by certified mail, return receipt requested.⁸

II. DISCUSSION

3. In its complaint, KFTL stated that on June 28, 2001, it elected mandatory carriage on EchoStar's system serving the Sacramento DMA. In its Opposition, EchoStar argued that KFTL failed to make a proper must carry election by July 1, 2001. EchoStar asserted that although KFTL stated that it mailed its election request by certified mail, EchoStar has no record of receipt of such a letter. KFTL was unable to provide documentary evidence that it complied with Section 76.66(d)(1)(ii), but instead claimed that the election carriage request was prepared and executed by its attorney, who thereafter instructed his administrative assistant to send the letter to EchoStar, via certified mail, return receipt requested. Based on the record, we denied KFTL's request for mandatory carriage because it failed to provide documentary evidence of its request for carriage, in writing, sent to the satellite carrier's principal place of business by certified mail, return receipt requested as required by the rules.⁹

4. KFTL in its petition for reconsideration and petition for waiver of Section 76.66(c)(3), requests that the Commission reconsider its Initial Order or alternatively, waive Section 76.66(c)(3), to allow it to request carriage on EchoStar's system after the July 1, 2001 deadline. KFTL asserts as its basis for reconsideration "erroneous" findings of fact and conclusions of law in the Initial Order.¹⁰ KFTL asserts that the Bureau decision ignored its evidence including "affidavits of three people involved in sending the carriage request declaring under the penalty of perjury that the request was sent using standard office procedures."¹¹ We find that the Bureau addressed fully all of the evidence offered by KFTL in its Initial Order.¹² The Bureau concluded that *Gannon University Broadcasting, Inc.*,¹³ its earlier decision addressing the rule requiring carriage requests to be sent by certified mail, was controlling

(...continued from previous page)

the same designated market area within the same local market; and (ii) in the case of a noncommercial educational television broadcast station, the market includes any station that is licensed to a community within the same designated market area as the noncommercial educational television broadcast station.").

⁶ See generally *DBS Must Carry Report & Order*, *supra*. The Commission affirmed and made clarifications to its carriage rules in a reconsideration proceeding. See *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, 16 FCC Rcd 16544 (2001) ("DBS Must Carry Reconsideration Order").

⁷ See 47 C.F.R. § 76.66(c)(3). See also 76.66(c)(4) ("Except as provided for in paragraphs 76.66(d)(2) and (3), local commercial television broadcast stations shall make their retransmission consent-mandatory carriage election by October 1st of the year preceding the new cycle for all election cycles after the first election cycle.")

⁸ 47 C.F.R. § 76.66(d)(1)(ii).

⁹ See 47 C.F.R. § 76.66(d)(1)(ii).

¹⁰ KFTL Reply to Opposition to Petition for Reconsideration/Petition for Waiver at 1-2.

¹¹ *Id.* at 2.

¹² Initial Order, at ¶¶ 6-9.

¹³ 10 FCC Rcd 8619 (CSB 1995).

rather than the cases cited by KFTL, which involved documents sent by ordinary mail that were not required to be delivered by certified mail.¹⁴ Petitioner also disregards the evidence submitted by EchoStar indicating that a request for carriage was never received.¹⁵ As the Bureau stated in its Initial Order, this particular notification method was chosen to provide assurance that satellite carriers are aware of their carriage obligations.¹⁶ Furthermore, this approach provided some degree of certainty to satellite carriers, such as EchoStar, who must contend with hundreds of election requests from local stations, and accordingly configure its satellite system. This bright line approach in the Commission rules was expressly designed to avoid the argument raised by KFTL.¹⁷ Under the Commission's rules, there is a specific mailing requirement for broadcast stations seeking carriage and KFTL's representations regarding its standard office practice were not sufficient to demonstrate that the election request was mailed or received.¹⁸ The Initial Order considered KFTL's evidence, which consisted of an unexecuted copy of a letter addressed to EchoStar and affidavits from the attorney who drafted the election request, the individual who purportedly directed that the documents be mailed, and the supervisor of the administrative assistant who was instructed to mail the election requests.¹⁹ Because KFTL failed to perfect its carriage request by the deadline, it is not entitled to mandatory carriage for the duration of the current cycle.²⁰

5. Finally, KFTL asserts that in *Gannon* the station that filed its retransmission consent election late was automatically granted must carry status.²¹ In contrast, KFTL asserts that the Bureau's rejection of its evidence that the election request was timely sent to EchoStar will result in "KFTL being denied carriage on the EchoStar system for the next four years – a draconian result that clearly frustrates the intent of Congress in ensuring that satellite carriers carry all qualified local stations."²² KFTL is correct in its assertion that the station in *Gannon* was granted must carry status as the default because cable carriage, unlike satellite carriage, "vests without request."²³ However, pursuant to the SHVIA, and in contrast with the cable provisions, satellite carriers are required to carry broadcast stations only "upon request."²⁴ As the Commission stated in the *DBS Must Carry Reconsideration Order*, "unlike the cable rules, the rules for satellite carriers essentially combine the election of must carry with the demand for carriage due to the differences in the statute."²⁵

6. KFTL alternatively requests a waiver of Section 76.66(c)(3), which requires that commercial television stations must notify a satellite carrier, by July 1, 2001, of its retransmission consent-mandatory carriage election for the first election cycle commencing January 1, 2002. KFTL

¹⁴ *United States v. Bowman*, 783 F.2d 1192 (5th Cir. 1986); *United States v. Ledesma*, 632 F.2d 670 (7th Cir. 1980), *cert. denied*, 449 U.S. 1998 (1980).

¹⁵ EchoStar Opposition to Must Carry Complaint at 2.

¹⁶ Initial Order, at ¶ 9.

¹⁷ *Id.*

¹⁸ *Id.* ¶ 6.

¹⁹ *Id.*

²⁰ *Id.* ¶ 64. We note that EchoStar expressed some willingness to discuss retransmission consent arrangements with KFTL. EchoStar Opposition to Petition for Reconsideration/Petition for Waiver at 6 n. 20.

²¹ KFTL Reply to Opposition to Petition for Reconsideration/Petition for Waiver at 2 n. 4.

²² *Id.*

²³ *DBS Must Carry Report & Order*, 16 FCC Rcd at 1929.

²⁴ See 47 U.S.C. 338(a)(1); *DBS Must Carry Report & Order*, 16 FCC Rcd at 1929; *DBS Must Carry Reconsideration Order*, 16 FCC Rcd at 16576.

²⁵ *DBS Must Carry Reconsideration Order*, 16 FCC Rcd at 16576 n. 215.

argues that Section 76.66(c)(3) is an administrative regulation that the Commission can waive.²⁶ Petitioner also argues that granting its waiver would serve the public interest and would be consistent with congressional intent.²⁷ KFTL asserts, presumably as a result of this proceeding, that EchoStar has actual knowledge of its carriage request, that the public interest will be served because the 60,000 EchoStar subscribers in the Sacramento DMA will receive local programming, and that KFTL would avoid suffering economic hardship that would result from its not being carried on EchoStar's system in the Sacramento DMA.

7. An applicant for waiver faces a "high hurdle" and "must plead with particularity the facts and circumstances which warrant such action."²⁸ Furthermore, "the applicant for waiver must articulate a specific pleading, and adduce concrete support, preferably documentary."²⁹ A waiver request assumes the "validity of the general rule."³⁰ Petitioner has failed to articulate a basis for a waiver that would not render the subject rule meaningless.

8. Granting petitioner's waiver request based on the general assertions contained in its petition would obviate the rule by creating a precedent for waiving the rule any time a party fails to comply. KFTL has cited no special circumstances to distinguish its failure to follow the rules. If the Bureau granted KFTL's waiver request, it would essentially be eliminating the rule requirement. A waiver in such circumstance would create significant uncertainty for all parties involved in carriage disputes and would not serve the public interest. Therefore, KFTL's petition for waiver of Section 76.66(c)(3) is denied.

III. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED**, pursuant to Section 338 of the Communications Act, as amended, 47 U.S.C. § 338, and Section 76.66 of the Commission's rules, 47 C.F.R. § 76.66, that the petition for reconsideration and, alternatively, petition for waiver filed by Family Stations, Inc., licensee of commercial television station KFTL, Stockton, CA **IS DENIED**.

10. This action is taken by the Deputy Chief, Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Media Bureau

²⁶ KFTL Reply to Opposition to Petition for Reconsideration/Petition for Waiver at 6.

²⁷ *Id.* at 6-7.

²⁸ *Wait Radio v. Federal Communications Commission*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd* 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972).

²⁹ *Id.* n. 9.

³⁰ *Id.* at 1158.